

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMONE E. FAWCETTE,

Defendant-Appellant.

UNPUBLISHED

April 1, 2003

No. 236872

Wayne Circuit Court

LC No. 01-000380-02

Before: O’Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant Fawcette was convicted by a jury of intentionally aiming a firearm at a person without malice, MCL 750.233, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to serve three days for the misdemeanor conviction (with credit for time served) and two years for the felony-firearm conviction. He appeals as of right. We affirm but remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first argues that he was denied a fair trial when the trial court’s instructions created jury confusion, which the court failed to adequately clarify by instructing the jury that one of the underlying offenses supporting the felony-firearm charge was the misdemeanor offense of intentionally aiming a firearm without malice. We disagree.

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). No error will be found where the instructions as a whole fairly presented the issues to be tried and adequately protected the defendant’s rights. *Id.* at 746-747. Because defendant failed to object to the instructions as given, this issue is unpreserved and subject only to review for plain error. MCR 2.516(C); *People v Carines*, 460 Mich 750, 763-768; 597 NW2d 130 (1999).

Although an element of the offense of felony-firearm is the commission or attempted commission of a felony, a defendant need not be *convicted* of a felony or the attempt to commit a felony in order to be convicted of felony-firearm. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982). A jury’s decision to convict a defendant of felony-firearm may be construed as an implicit finding that the defendant committed or attempted to commit the underlying felony, notwithstanding its acquittal of the defendant on the underlying felony or its conviction

on a lesser misdemeanor offense. *Id.* at 452; *People v Bonham*, 182 Mich App 130, 136; 451 NW2d 530 (1989). Thus, a jury may render seemingly inconsistent verdicts.

Here, there is no dispute that the trial court misstated the law when it initially informed the jury that defendant could not be convicted of felony-firearm if he was either acquitted of felonious assault or convicted of the lesser offense of intentionally aiming a firearm without malice. However, once the jury expressed confusion, the trial court adequately and properly addressed this confusion by re-reading the felony-firearm standard instruction and instructing them to follow that instruction. Contrary to defendant's argument, the court was under no duty to inform the jury that the lesser offense of intentionally aiming a firearm without malice is a misdemeanor.¹ *Bonham, supra*.

Notwithstanding the lack of any basis to vacate defendant's felony-firearm conviction, we note that consecutive sentencing—which is generally mandatory with a felony-firearm conviction—was precluded because defendant was convicted only of a lesser misdemeanor offense, not the underlying felony. See *People v Clark*, 463 Mich 459, 464; 619 NW2d 538 (2000). The felony-firearm statute authorizes a consecutive sentence to a “term of imprisonment imposed for *the conviction of the felony*.” MCL 750.227b(2) (emphasis added). Thus, concurrent sentencing was applicable here.

The trial court sentenced defendant to serve three days in the county jail, with credit for time served, for the misdemeanor conviction and to serve a mandatory two-year prison term for the felony-firearm conviction. While the court did not expressly direct either consecutive or concurrent sentencing on the record or in the judgments of sentence, it appears to us that consecutive sentencing was effectively imposed because defendant was given credit for time served against his misdemeanor conviction, but not against his felony-firearm conviction. Accordingly, we remand this matter to the trial court for the ministerial task of correcting the judgment of sentence to reflect concurrent sentencing and a single credit of three days for jail time served, to be applied concurrently against defendant's felony-firearm conviction and

¹ Defendant relies heavily upon an unpublished decision of this Court, *People v Jeffrey Smith*, unpublished opinion per curiam of the Court of Appeals (No. 164989, issued 12/1/94), in which the defendant was charged with assault with intent to murder and felony firearm. The jury was instructed on various lesser offenses, and during deliberations, inquired of the court whether the lesser offenses were felonies and, if not, whether they could form the basis for a conviction of felony-firearm. The trial court refused to answer the questions, and instead instructed the jurors to rely on their collective memories concerning the previous instructions. *Id.*, slip op at 1. This Court reversed, holding that while the trial court was not required to inform the jury that the lesser offenses were misdemeanors or felonies, it was under a duty to clarify the jury's confusion by reiterating its correct instructions. This Court concluded: “A court may not presuppose inconsistent verdicts where a jury expresses actual confusion before delivering its verdict.” *Id.*, slip op at 2. Besides the fact that unpublished decisions constitute nonbinding precedent, MCR 7.215(C)(1), the *Smith* decision is not helpful to defendant. Unlike in *Smith*, where the trial court refused to assuage the jury's confusion by reiterating its correct instructions, the trial court here did properly address the jury's confusion.

misdemeanor conviction of intentionally aiming a firearm without malice. See MCR 6.435(A); MCR 7.216(A)(7); *People v Herndon*, 246 Mich App 371, 392; 633 NW2d 376 (2001).

Defendant next argues that insufficient evidence was presented to permit the jury to convict him of felony-firearm. We disagree. Conviction of felony-firearm requires proof beyond a reasonable doubt of two elements: (1) possession of a firearm (2) during the commission of a felony or an attempt to commit a felony. *Lewis, supra*. As noted above, conviction of the underlying felony is not an element of the crime. Here, the two police officers (complainants) testified that after they heard someone from behind yell “freeze,” they turned and saw defendant Fawcette pointing a gun at them. Both officers stated that they feared for their lives before defendant reholstered his weapon.

While it is true that the jury acquitted defendant of the underlying felonious assault charge, and convicted him of the misdemeanor offense of intentionally aiming a firearm without malice, the jury’s decision to convict of felony-firearm may be construed as a decision to release defendant from some of the consequences of his act without absolving him of all responsibility. *Lewis, supra* at 451 n 10. Thus, to the extent that the jury’s verdicts appear to be inconsistent, they are likely the result of jury compromise or leniency. *Id.* at 450. Accordingly, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented to allow a rational trier of fact to find that the essential elements of the felony-firearm charge, including defendant Fawcette’s commission or attempted commission of a felony, were proved beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52-54; 549 NW2d 1 (1996).

Defendant next argues that reversal is required because the trial court failed to comply with MCR 6.412(B), which requires that the trial court administer an oath to prospective jurors before beginning the jury selection process. Because defendant did not object at trial to the failure to administer the oath, this issue is not preserved. To avoid forfeiture of this unpreserved nonconstitutional issue, defendant must demonstrate plain error that was outcome-determinative or error that falls under the category of cases where prejudice is presumed or reversal is automatic. *Carines, supra*. This Court will reverse only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence. *Id.*

Although the record does not reflect that the venire panel was sworn in compliance with MCR 6.412(B), the trial court did administer an oath to the jury after selection that substantially comported with the oath required by MCL 768.14.² See *People v Pribble*, 72 Mich App 219, 225; 249 NW2d 363 (1976). Then, immediately before instructing the jury prior to deliberations, the trial court informed the jury: “Remember that you’ve taken an oath to return a true and just

² MCL 768.14 provides:

The following oath shall be administered to the jurors for the trial of all criminal cases: “You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God.”

verdict based only on the evidence and my instructions on the law.” Under these circumstances, where no timely objection was made to the failure to administer an oath prior to the jury selection process, yet the jury was sworn after being selected, defendant has failed to demonstrate plain error affecting his substantial rights. *Carines, supra*.

Defendant’s convictions are affirmed, but we remand to the trial court for correction of the judgment of sentence to reflect concurrent sentencing and a single credit for time served against both convictions. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray